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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1061

JAMES E. CURRY, *Petitioner*

v.

ROBERT E. SHER, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

There were no opinions delivered in the courts below.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Act of June 25, 1948, c.646, 62 Stat. 929, as amended, 28 U.S.C. 1291, provides in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *.

The pertinent portions of the Act of Dec. 23, 1963, 77 Stat. 478, as amended, D.C. Code §§ 16-501, 16-505, 16-506 and 16-510, are set forth in Appendix A hereto, *infra*, pp. 8-10.

QUESTION PRESENTED

Whether a district court order denying a motion to dismiss or dissolve an attachment is an appealable order.

STATEMENT OF THE CASE

Respondents brought this action in the United States District Court for the District of Columbia (D.C. Code, § 11-521) to recover attorneys fees for legal services rendered to petitioner, in the amount of $10,053.50. Simultaneously, respondents, in accordance with the provisions of D.C. Code, § 16-501, obtained a writ of attachment before judgment in the amount of respondents' claim. To obtain such writ, respondents filed the affidavit required by the D.C. Code, and also filed the required surety bond in twice the amount of their claim. The writ of attachment was duly served on a garnishee who responded that there were in his possession or charge credits of petitioner in the amount of $138,890.

After petitioner was served with summons and complaint, he moved to dissolve the attachment on the ground that respondents' affidavit did not comply with D.C. Code, § 16-501. The district court denied petitioner's motion.

From that order, petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. Respondents' motion to dismiss the appeal for want of jurisdiction came before Judges Fahy,

Tamm, and Robinson and the court (Judge Robinson not participating) dismissed the appeal "for lack of an appealable order." Thereafter the court (Judges Fahy, Tamm, and Robinson) denied petitioner's petition for rehearing. Petitioner also requested rehearing *en banc,* but no judge requested a vote thereon. F.R. App.P., Rule 35(b).

ARGUMENT

1. The case does not warrant review. The decision of the court below dismissing the appeal was eminently correct, and there is no conflict of decisions.

When petitioner's motion to dissolve the attachment was denied by the district court, petitioner was free, if he wanted to pursue his attack on the attachment, to file affidavits traversing the respondents' affidavit, as provided in D.C. Code, § 16-506, *infra,* p. 10. The issue as to "whether there was just ground for issuing the attachment" would then have been tried,[1] and if the proofs had not sustained respondents' affidavit, the court would have quashed the writ of attachment.

Petitioner did not see fit, however, to try the issue of the validity of the attachment. Instead, he stood on his motion to dissolve the writ and appealed from the district court's denial of that motion. Petitioner thus put himself in the position of a defendant who, after denial of his motion to dismiss a complaint, stands on it and appeals from the order of denial. It is well sett'ed that such a denial, without more (cf. 28 U.S.C. 1292 (b)), is not appealable. *Catlin* v. *United*

[1] D.C. Code, § 16-506 provides that such trial may be held on three days' notice by "a judge at chambers," by the court alone, or by a jury, and that the trial may be "as well upon oral testimony as upon affidavits."

States, 324 U.S. 229, 236; *United States* v. *Florian*, 312 U.S. 656; *Newport* v. *Revyuk*, 283 F.2d 145 (C.A. 8); *Smith* v. *Benedict*, 279 F.2d 211 (C.A. 7); *Spruill* v. *Cage*, 262 F.2d 355 (C.A. 6); *Ercona Camera Corporation* v. *Brownell*, 100 U.S. App. D.C. 394, 246 F.2d 675; *Connell* v. *Dulien Steel Products*, 240 F.2d 414, 417 (C.A. 5); *Division 689, Etc.* v. *Capital Transit Company*, 97 U.S. App. D.C. 4, 227 F.2d 19; *John Hancock Mut. Life Ins. Co.* v. *Kraft*, 200 F.2d 952 (C.A. 2).

As stated by this Court in *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 123-24:

> Since its establishment, it has been a marked characteristic of the Federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance. [Citing cases] This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for Federal appellate jurisdiction.

"Good judicial administration" requires that a judgment of which review is sought "should be final * * * as to the whole subject-matter" (see *Collins* v. *Miller*, 252 U.S. 364, 370) rather than as to merely a liminal matter as here.

Measured by these standards, the order denying petitioner's motion to dissolve the writ was clearly no more appealable than an order denying a preliminary motion to dismiss a complaint. The whole subject matter of the attachment could not be disposed of until, at the

very least, petitioner would file the traversing affidavits contemplated by D.C. Code, § 16-506, and go to trial on the issue as to "whether there was just ground for issuing the attachment" (*ibid*). But this the petitioner refused to do. Until such time, however, "it is impossible to know whether the [petitioner] will be able to show any colorable claim of prejudicial error" (see *Andrews* v. *United States*, 373 U.S. 334, 340) by reason of the attachment.

Indeed there are authorities which indicate that even had petitioner gone to trial on his challenge to the attachment, an adverse decision would not have been appealable by him prior to a final determination of the principal claim to which the attachment proceeding was merely ancillary. *West* v. *Zurhorst*, 425 F.2d 919 (C.A. 2), citing *Swift & Co.* v. *Compania Colombiana*, 339 U.S. 684, 689; *American Mortgage Corp.* v. *First National Mortgage Co.*, 345 F.2d 527 (C.A. 7).[2]

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[2] *Baxter* v. *United Forest Products Co.*, 406 F. 2d 1120 (C.A. 8), cert. denied, 394 U.S. 1018, cited by petitioner as contrary, is a far different type of case. There the district court simply ordered certain instalment payments due from plaintiff to defendants to be paid into the court's registry and withheld from the defendants. There was no question of compliance with the state attachment law, the district court taking the position that it was inapplicable. As stated by the court of appeals (406 F.2d at 1125), "The question which makes this matter reviewable is whether the law permits a trial court to circumvent the Iowa law of attachment altogether." On the contrary, in *West* and *American Mortgage*, *supra*, as in the instant case, the district courts fully recognized the applicability of the local attachment laws and held, as a matter of law, that plaintiffs were in compliance with them.

The citation by petitioner of *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, is also inapposite. (1) As petitioner himself recognizes, the question of appealability was not raised or considered in the case, and it is therefore not a holding on that question. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 363,

But there is no need to go that far. For present purposes it suffices that, even viewing the attachment issue as independent of the principal claim, petitioner did not pursue his attack on the attachment to a final decision as to "whether there was just ground for issuing the attachment" (D.C. Code, § 15-506) as required by 28 U.S.C. 1291.

2. The petition is wholly without merit and futile. We suggest that indeed it is an exercise in frivolousness. Petitioner, who appears *pro se*, is nevertheless a member of the bar. As such he has undoubtedly known all along of his right under D.C. Code, § 16-506 to a speedy trial and determination of the question "whether there was just ground for issuing the attachment." But he spurned such a trial and determination, as he did the statutory means provided (D.C. Code, § 16-510) for securing the release of the attached property. Instead he has gone the appellate route, first to the court of appeals, and now to this Court. He has used his petition as a device to spread before this Court the same scurrilous, scandalous, defamatory, and impertinent statements about respondents [3]

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and cases there cited. (2) Under the law of Wisconsin, where *Sniadach* arose, the defendant is "without any opportunity to be heard" until the trial of the main suit (395 U.S. at 339), as distinguished from the provisions of D.C. Code, § 16-506, which afford a defendant a speedy trial on the question of the attachment itself. (3) Freezing a wage-earner's wages without a hearing for an indefinite time, which "may as a practical matter drive a wage-earning family to the wall," 395 U.S. at 341-42, is a far cry from the instant case where the attachment was levied on credits of petitioner in the amount of $10,053 out of a total of $138,890 of such credits held by the garnishee.

[3] Witness the fact that 80 per cent of the "Statement of the Case" contained in the petition is devoted to matters which petitioner himself recognizes are not involved in this litigation, in

that he spread before the court of appeals and the district court. This is conduct which, we respectfully suggest, is unbecoming a member of the bar and may warrant disciplinary action against petitioner.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ABRAHAM J. HARRIS
888 17th Street, N. W.
Washington, D. C. 20006
Counsel for Respondents

SHER & HARRIS
888 17th Street, N.W.
Washington, D. C. 20006
Of Counsel

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the course of which petitioner makes accusations against not only one of the respondents, but also a district judge and four other lawyers, two of whom are dead. To answer all these impertinent and defamatory statements, implications, and insinuations is not the function of this brief. However, one charge made by petitioner, that respondent Sher "misappropriated funds" is so blatantly false that it must be answered. The funds referred to had been turned over to respondent Sher to be held in escrow pending approval of a settlement betweeen the parties in the case of *Cohen* v. *Curry*, Civil Action No. 86-69, United States District Court for the District of Columbia. When it appeared that the parties to the litigation disagreed as to the settlement, Mr. Sher requested the court for instructions as to the disposition of the funds. In response to his request, Judge Alexander Holtzoff entered an order on June 23, 1969, authorizing Mr. Sher to return the funds and discharging and relieving him of all responsibility and liability with respect to all or any part of said funds. The funds were returned. A copy of Judge Holtzoff's order is appended hereto as Appendix B, *infra*, p. 11. This is what petitioner denominates the misappropriation of funds.

APPENDIX A

The pertinent provisions of the Act of December 23, 1963, 77 Stat. 478, as amended, D.C. Code § 16-501 *et seq.*, follow:

§ 16-501. *Attachment before judgment; affidavit and bond*

(a) This section applies to any civil action in the United States District Court of the District of Columbia or the District of Columbia Court of General Sessions, for the recovery of:

• • •

(2) a debt; or

(3) damages for the breach of a contract, express or implied.

(b) In an action specified by subsection (a) of this section, the plaintiff, his agent, or attorney, may file an affidavit as provided by subsections (c) and (d) of this section either at the commencement of the action or pending the action.

(c) The affidavit shall comply with the following requirements:

(1) show the grounds of plaintiffs' claim;

(2) set forth that plaintiff has a just right to recover what is claimed in his complaint;

• • •

(4) where the action is to recover a debt, state the amount thereof; and

(5) where the action is to recover damages for breach of a contract set out, specifically and in detail, the breach complained of and the actual damage resulting therefrom.

(d) The affidavit shall also state one of the following facts with respect to defendant:

• • •

(3) he has removed or is about to remove some or all of his property from the District, so as to defeat just demands against him;

(4) he has assigned, conveyed, disposed of, or secreted, or is about to assign, convey, dispose of, or secrete his property with intent to hinder, delay, or defraud his creditors;

• • •

(e) Before a writ of attachment and garnishment is issued, the plaintiff shall first file in the clerk's office a bond, executed by himself or his agent, with security to be approved by the clerk, in twice the amount of his claim, conditioned to make good to the defendant all costs and damages which he may sustain by reason of the wrongful suing out of the attachment;

• • •

(f) If the plaintiff files an affidavit and bond as provided by this section, the clerk shall issue a writ of attachment and garnishment, to be levied upon as much of the lands, tenements, goods, chattels, and credits of the defendant as may be necessary to satisfy the claim of the plaintiff. (Dec. 23, 1963, 77 Stat. 543, Pub.L. 88-241, § 1, eff. Jan. 1, 1964; Aug. 6, 1965, 79 Stat. 447, Pub.L. 89-113, § 1).

§ 16-505. *Sufficiency of plaintiff's bond*

The defendant or any other person interested in the proceedings who is not satisfied with the sufficiency of the surety or with the amount of the penalty named in the bond filed pursuant to section 16-501, may apply to the court for an order requiring the plaintiff to give an additional bond in such sum and with such security

as may be approved by the court. If the plaintiff fails to comply with any such order the court may order the attachment to be quashed and any property attached or its proceeds to be returned to the defendant or otherwise disposed of, as to the court may seem proper. (Dec. 23, 1963, 77 Stat. 545, Pub.L. 88-241, § 1, eff. Jan. 1, 1964.)

§ 16-506. *Traversing affidavits; quashing writ of attachment; trial of issues*

If the defendant files affidavits traversing the affidavits filed by the plaintiff the court shall determine whether the facts set forth in the plaintiff's affidavits as ground for issuing the attachment are true, and whether there was just ground for issuing the attachment. When, in the opinion of the court, the proofs do not sustain the affidavit of the plaintiff, his agent, or attorney, the court shall quash the writ of attachment. This issue may be tried by the court or a judge at chambers after three days' notice. The issue may be tried as well upon oral testimony as upon affidavits. If the court deems it expedient, a jury may be impaneled to try the issue. (Dec. 23, 1963, 77 Stat. 545, Pub.L. 88-241, § 1, eff. Jan. 1, 1964.)

§ 16-510. *Release of property or credits from attachment; sufficiency of undertaking*

* * *

(c) Either the defendant or the person in whose possession credits are attached may obtain a release of the credits from the attachment by filing an undertaking with security to be approved by the court. (Dec. 23, 1963, 77 Stat. 547, Pub.L. 88-241, § 1, eff. Jan. 1, 1964.)

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CEIL BRYSON COHEN, Ancillary Executrix of the Estate of Henry Cohen, *Plaintiff*,

v.

JAMES E. CURRY, *Defendant*.

Civil Action No. 86-69

Order

This cause coming on to be heard on the motion of Robert E. Sher, Esq., attorney of record for the defendant, for instructions as to the disposition of certain funds in his possession and control; and it appearing that on May 23, 1969, in an attempt to carry out a settlement of this action, $150,000 was paid to Mr. Sher by I. S. Weissbrodt, Esq. from funds held by him as escrow agent pursuant to Order of this Court of February 11, 1969; and it further appearing that on May 26, 1969, Mr. Sher invested said $150,000 in United States Treasury Bills due June 23, 1969, which Mr. Sher bought at a discount of $646.87; and it further appearing that the said settlement was subject to the approval of this Court; and this Court on June 20, 1969, having refused to approve said settlement; it is by the Court this 23rd day of June 1969

ORDERED that Robert E. Sher, Esq. be and he hereby is authorized to return to I. S. Weissbrodt, Esq., the aforesaid sum of $150,000, either by check or by turning over to Mr. Weissbrodt the aforesaid United States Treasury Bills;

FURTHER ORDERED that Robert E. Sher, Esq. be and he hereby is authorized to pay to I. S. Weissbrodt, Esq. the sum of $646.87;

FURTHER ORDERED that upon complying with the two previous paragraphs of this Order, Robert E. Sher, Esq. shall

be fully discharged and relieved of all responsibility and liability with respect to all or any part of said funds;

FURTHER ORDERED that I. S. Weissbrodt, Esq. shall receive and hold such funds in accordance with the aforesaid Order of this Court of February 11, 1969.

/s/ ALEXANDER HOLTZOFF
Judge

Seen:

SACHS, GREENEBAUM & FROHLICH
By s NEWTON FROHLICH
Attorneys for Plaintiff

s JAMES E. CURRY
James E. Curry
Defendant